In my view, both equity and priority are in favour of the appellant. Had the respondent, after he had obtained judgment on 4th December 1952, applied to the Court for an order for the sale of the land under section 134 of the Land Code, I think the Court must have refused such an order.

I would allow this appeal with costs and order the deposit in Court to be paid out to the appellant.

Appeal allowed.

Solicitors: *Bannon & Bailey; Lovelace & Hastings.*

STRAITS STEAMSHIP CO. LTD. v. AZIZ BIN ISMAIL & ORS.

[C. A. (Mathew C.J., Murray-Aynsley C.J.(S), and Hill J.) September 1, 1954]

[Penang — F.M. Civil Appeal No. 8 of 1954]

Master and Servant — Agreement to provide for establishment of Non-Contributory Provident Fund providing gratuities to long-service employees — Construction of provision.

This appeal concerned the construction of the Non-Contributory Provident Fund Rules for daily rated employees of the Sungei Nyok Dockyard belonging to the appellant Company. The Rules resulted from negotiations between the Company and their daily-rated Dockyard employees following a strike. The manner in which payments from the Fund were to be calculated and paid was contained in three clauses which were annexed to the agreement entered into between the Company and the representative of the employees. Under clause A the Company were to credit each employee with a percentage of his basic wage; under clause B an employee (or his personal representatives) subject to the scheme, on termination of his employment for any reason, was to be paid the sum standing to his credit; and under clause C an employee retiring before October 1, 1957, with not less than 10 years' service and having reached the age of 50 years at the date of retirement would be "guaranteed" a payment "including any sums which may be standing to the credit of his account in the Fund," to be calculated in a certain way.

The question before the Court was whether the sum to be paid under clause C was in addition to what was to be paid under clause B.

Held, per Mathew C.J.: the purpose of clause C was to ensure that employees of the Company who had had long service with the Company prior to the institution of the Provident Fund would receive benefits commensurate with the long years of service they had given to the Company prior to the institution of the scheme; those employees who joined a few years before the scheme was instituted would, if they completed ten years' service prior to October 1, 1957, and retired with the approval of the management, receive a guaranteed minimum payment.

Per Murray-Aynsley C.J.(S): as long as it could be shown that a single individual might receive more under clause C than under Clause B, clause C would not be without meaning.

Per Hill J.: the true construction of clause C was that the Company guaranteed that the class of employees specified in that clause would receive on retirement a payment, including any sums payable in accordance with clause A and clause B, which would not be less than the amount calculated in accordance with the terms set out in clause C.

COURT OF APPEAL.

R. D. Hume for the appellants.

M. Knorpel (*Chang Min Tat* with him) for the respondents.

Cur. Adv. Vult.

Mathew C.J.: — As a result of negotiations between the appellant-company and its employees, following a strike, the Non-Contributory Provident Fund Rules for Daily Rated Employees of the Sungei Nyok Dockyard were amended by the company to provide for gratuities to long-service employees. The manner in which payments from the Fund were to be calculated and paid is contained in three clauses which were annexed to the agreement entered into between the company and the representative of the employees on 23rd November 1950. The relevant parts of these clauses read as follows:—

A. "With effect from 1st April, the Company will set aside monthly a sum equal to five per cent of the basic wage paid to each worker on a daily rate of pay to be credited to an account in each man's name. With effect from 18th October 1950, the amount to be credited monthly will be increased to ten per cent of the basic wage.

B. The Company will pay to an employee specified in paragraph A or to his legal personal representatives, the sum standing to his credit in the account at the time, in the event of the employment being terminated for any cause .....

C. An employee retiring before 1st October 1957, with not less than ten years service at the date of retirement, and who has reached the age of fifty years at the date of retirement will be guaranteed a payment including any sums which may be standing to the credit of his account in the Fund calculated as follows:—

An employee will receive the equivalent of three months Provident Fund donations for each completed year of service, based on the basic wages paid to him on retirement. For the purpose of this calculation, one month will be taken to mean a month of twenty-six working days. For the purpose of calculating years of service, the Dockyard will be deemed to have commenced operations under the present Management as at 1st January 1922.

Provided always that the employee retires with the approval of the Management, is not dismissed for misconduct, or is not forced to retire through circumstances occasioned by his own misconduct ....."

The contention of the respondents is that any sum payable under clause C is additional to what is payable under clause B. The appellant-company's contention is that any payment under clause C is inclusive of any sum standing to the credit of an employee under clause B.

The learned trial judge held that clauses B and C were ambiguous. He came to this conclusion on three grounds:—

(i) that in most cases the sum calculated under clause C would be less than under clause B;

(ii) the word "guarantee" had no particular significance;

(iii) the words "now amended to provide for gratuities to long-service employees" which occur in the body of the Agreement confirmed his opinion that payments under clause C were to be additional to payments under clause B.

In my view, the purpose of clause C was to ensure that employees of the company who had had long service with the company prior to the institution of the Provident Fund would receive a benefit commensurate with the long years of service they had given to the company prior to the institution of the scheme, and that those employees who joined a few years before the scheme was instituted would, if they completed ten years service prior to 1st October, 1957 and retired with the approval of the management, receive a guaranteed minimum payment. Its aim was thus to prevent possible hardship in the case of those employees who had but small sums standing to their credit under clause A.

It has been stated that there are cases where the payment calculated under clause C will be less than the amount payable under clause B. This may be so, but in such a case, clause C will be ineffective for, the guarantee, that an employee who falls within the scope of clause C shall receive a minimum payment of so much, will have operated. If the word 'guarantee' in clause C is given its ordinary colloquial meaning, then I can find no ambiguity in clauses C and B.

I would allow this appeal with costs and order that the deposit be paid to the appellants. I would further make a declaration in accordance with this judgment.

Murray-Aynsley C.J. (S.) : — In the year 1950 the appellant Company after a strike at the Dockyard at Sungei Nyok came to terms with representatives of its employees and these terms included provisions for the establishment of what was called a Non-Contributory Provident Fund. This is set out on page 10 of the record.

Under Paragraph A the Company were to credit each employee with a percentage of his basic wage.

Under Paragraph B an employee (or his personal representatives) subject to the scheme, on termination of his employment for any reason, was to be paid the sum standing to his credit.

Under C, in the case of employees leaving (subject to certain conditions) the employment of the appellants before 1st October 1957 such employees were "guaranteed" a payment "including any sums which may be standing to the credit of his account in the fund," to be calculated in a certain way.

The question to be decided is whether the sum to be paid under C is in addition to what was to be paid under B.

The learned trial Judge thought that it was so. I find myself unable to agree. The use of the word 'including' excludes any intention to make 'C' additional to 'B'. I do not think that the use of the word 'guarantee' need cause any difficulty. It merely means that the employee would get at least what was provided under 'C' which in the case of employees with about 30 years of service would be more than they would get under 'B'. The use of the word 'guarantee' in this sense is so common in current usage that I do not think it is necessary to enlarge upon the matter. A common instance used to be found when Clerks in the Temple were content with a guarantee from their employers. As long as it could be shown that a single individual might receive more under 'C' than under 'B', 'C' would not be without meaning. In the early days of any provident scheme such a provision is very usual, hence the limiting date. The meaning given to the paragraph in the Court below makes the whole scheme quite irrational.

I should allow the appeal and make a declaration in the sense indicated. It should be noted that only the last respondent has any immediate interest in the result of this litigation. One of the others might be interested. The rest never could be interested personally. But the appellants do not rely on this in any way. The appellants are entitled to the costs of the appeal and the deposit should be paid out to them.

Hill J. : — This appeal is concerned with the construction to be placed on the Non-Contributory Provident Fund Rules for daily rated employees of the Sungei Nyok Dockyard belonging to the appellant Company.

The Rules resulted, as pointed out by the learned trial judge in his written judgment, from negotiations between the Company and its daily-rated Dockyard employees after a strike.

The negotiations appear to have been concluded in November, 1950, by the agreement which appears at page 8 of the record. Clause "C" of this agreement reads as follows :—

> "C. Non-Contributory Provident Fund :
> Details of the Non-Contributory Provident Fund Scheme as announced on 1st April, and now amended to provide for gratuities to long-service employees, are as per attached."

As a result of this clause in order to provide for gratuities to long-service employees, there was included in the Non-Contributory Provident Fund rules page 10 of the record, the following Clause C :—

> "C. An employee retiring before 1st October 1957, with not less than ten years' service at the date of retirement, and who has reached the age of fifty years at the date of retirement will be guaranteed a payment including any sums

which may be standing to the credit of his account in the Fund, calculated as follows :—

An employee will receive the equivalent of three months' Provident Fund donations for each completed year of service, based on the basic wages paid to him on retirement. For the purpose of this calculation, one month will be taken to mean a month of twenty-six working days. For the purpose of calculating years of service, the Dockyard will be deemed to have commenced operations under the present Management as at 1st January, 1922.

Provided always that the employee retires with the approval of the Management, is not dismissed for misconduct, or is not forced to retire through circumstances occasioned by his own misconduct."

It is with the relation of this Clause to Clauses A and B of the Rules that the question of construction arises.

Clauses A and B are as follows :—

" With effect from 1st April, the Company will set aside monthly a sum equal to five per cent of the basic wage paid to each worker on a daily rate of pay to be credited to an account in each man's name.

With effect from 18th October, 1950, the amount to be credited monthly will be increased to ten per cent of the basic wage.

" The Company will pay to an employee specified in paragraph A, or to his legal personal representatives the sum standing to his credit in the account at the time, in the event of the employment being terminated for any cause."

The Company contends that the intention of Clause C was to ensure a minimum benefit to employees with not less than ten years' service who having attained the age of 55 years should retire with the Company's permission before the 1st October, 1957.

The learned trial judge considered that the the phrasing of Clause C was particularly unfortunate and that the Rules were ambiguous. This opinion resulted from a consideration of hypothetical mathematical results of the two Clauses, B & C, and it appeared to him that when the Company said "an employee will be guaranteed a payment" what they really meant was that an employee would be paid.

I do not think, with respect, that this approach to the matter is correct. In the first place there was no evidence to show, as he held, that in the vast majority of cases the sum payable to an employee under Clause B is a great deal more than the sum alleged to be guaranteed under Clause C. The amounts would be bound to vary considerably according to the dates of retirement and the reason for the introduction of Clause C appears to me to have been to guarantee a minimum payment to long service employees who by early retirement would have acquired only small benefits under Clause B.

It may be that Clause C is unfortunately worded, but I cannot agree that it is ambiguous or that the words "an employee will be guaranteed a payment" should be construed as meaning an employee would be paid. In my view these words mean that the Company gave an undertaking and that it would be straining the ordinary meaning of the word "including" used in Clause C, to construe it as meaning "in addition to."

I therefore find myself in agreement with the appellant's contention and am of opinion that the true construction of Clause C is that the Company guaranteed that the class of employees specified in that clause would receive on retirement a payment, including any sums payable in accordance with Clause A and Clause B, which would not be less than the amount calculated in accordance with the terms set out in the second paragraph of Clause C.

I would therefore allow the appeal, with costs.

Appeal allowed.

Solicitors : *Hogan, Adams & Allan; Lim, Lim, & Oon.*

M. G. SHETH & ORS. v. LAM THYE CO. LTD.

[C. A. (Mathew C.J., Murray-Aynsley C.J.(S), and Hill J.) September 1, 1954]

[Penang — F.M. Civil Appeal No. 36 of 1954]

Sale of Goods — Contract for delivery c.i.f. — Sale by description — Description not trade term, but understood by parties — Goods delivered not corresponding to description — Question of acceptance — Damages.

This litigation arose out of a sale c.i.f. of some Indian tiles. It was a sale by description BYMH Brand 1st Class Roofing Tiles and Ridges (Feroke Size). It appeared from the evidence that "Feroke Size" was not a usual trade description, but did in certain circles bear a particular size and it was understood by the parties to the contract to mean a particular size. The goods shipped by the appellants did not correspond with the description. When the goods arrived the respondents wrote a grumbling letter. Meanwhile the goods were taken from the ship in a lighter; some were landed in Butterworth, the rest were taken to Alor Star where they arrived early in May, for delivery to a sub-purchaser from the respondents.

Held : (1) the respondents' dealing with the consignment constituted an acceptance, and therefore they had lost their right to reject and were confined to their remedy in damages; (2) the question of damages should be referred to the Registrar for assessment after due enquiry, the measure of damages being the difference between the value of the consignment actually received and the value which the consignment would have had had it been delivered in accordance with the correct description.

Cases referred to :—

(1) *Hardy & Co. v. Hillerns & Fowler* (1923) 2 K.B. 490.

(2) *Varley v. Whipp* (1900) 1 Q.B. 513.